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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 347.

MAX JABEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

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STATEMENT.

The Government's brief makes two arguments, (1) that a complaint under 26 U. S. C., § 6531, need not aver probable cause, and (2) that in any event, the complaint herein demonstrated probable cause. Our initial brief dealt with the second contention only, since heretofore there had been no question that a complaint under 26 U. S. C., § 6531, was required to show probable cause, **Greenberg v. United States**, 320 F. 2d 467 (9th Cir. 1963); **Jaben v. United States**, 333 F. 2d 535 (8th Cir. 1964); **Sanseverino v. United States**, 321 F. 2d 714 (10th Cir. 1963); **United States v. Black**, 216 F. Supp. 645 (W. D. Mo. 1963); **United States v. Scheetz**, 224 F. Supp. 789 (S. D. Ind. 1963). Thus, this brief is devoted only to answering contention (1) of the Government's brief made for the first time in this Court.

ARGUMENT.

A Complaint Which Merely States the Essential Facts Constituting the Offense and Which Does Not Show Probable Cause, Does Not Satisfy Section 6531.

68A Stat. 815, Title 26, U. S. C., § 6531, provides that a complaint timely filed with the Commissioner extends the statute of limitations for a period of nine months. The complaint referred to obviously is the one defined by Rules 3 and 4 of the Federal Rules of Criminal Procedure:

Rule 3. The Complaint

"The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4. Warrant or Summons Upon Complaint

(a) **Issuance.** If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the Government, a summons instead of a warrant shall issue. . . ."

Reading Rules 3 and 4 together, the "probable cause" mentioned in Rule 4 clearly must be read into Rule 3 as a requirement for a complaint. This is the holding of **Giordenello v. United States**, 357 U. S. 480, 78 S. Ct. 1245, 92 L. Ed. 436 (1958). Also, the cases decided under § 6531 unanimously hold that the complaint must show probable cause, and satisfy the requirements of **Giordenello. Greenberg v. United States**, 320 F. 2d 467 (9th Cir. 1963); **Sanseverino v. United States**, 321 F. 2d 714 (10th Cir. 1963); **United States v. Black**, 216 F. Supp. 645 (W. D.

Mo. 1963); **United States v. Scheetz**, 224 F. Supp. 789 (S. D. Ind. 1963). This was also the holding of the Eighth Circuit in this case (R. 61). In addition, this has heretofore been the position of the Justice Department as evidenced by its brief below in this case, and by the fact that the form complaint used herein by it to toll the statute of limitations "was drawn up by the Justice Department to meet the requirements of the **Giordenello** decision" (Gov. Br. 29 fn 15).

It is submitted that Congress intended that the complaint show probable cause in order that the statute be tolled; and that Congress in requiring a complaint meant a valid complaint, and not merely "a complaint" (Gov. Br. 13).

As the Government suggests at page 15 of its brief, the purposes of allowing 9 additional months to present a tax case to the grand jury was that a grand jury may not be in session; time may be needed to investigate such matters as the taxpayer's explanation; or the taxpayer may desire an opportunity to confer with the Justice Department or the United States Attorney. The Government does not suggest, nor would it be justified in suggesting, that the purpose of the additional nine months was to give it more time to investigate to make its case. If Congress thought six years was not enough time to investigate, the obvious solution would have been to increase the statute beyond six years and this it did not do. Thus, in determining what was the Congressional intent, we must keep in mind the limited purpose of the nine month extension, which was to give the defense time to confer with the Government, to give the Government time to investigate defense claims, and to give time to convene a grand jury. Since, the purpose of the additional 9 months is not to give the Government time to investigate further, it seems altogether reasonable that Congress would require a showing of "probable cause" within the limitation period, since

normally within the six years, the Government would have to make a showing sufficient for a grand jury to find "probable cause". Congress must have been concerned that extension of the statute of limitations by the Government could do violence to the spirit of the statute of limitations. But, by requiring a showing of probable cause to a Commissioner within the six years, Congress has preserved the spirit of the statute of limitations, since the taxpayer is protected as much by the finding of "probable cause" by a "neutral and detached magistrate" as he is by a finding of "probable cause" by a grand jury. At the same time, the purpose of finding time to convene a grand jury, finding time for the Government to investigate defense explanations, and finding time for the Government and defense to confer, is satisfied. Thus the requirement that a showing of probable cause be made within the six years preserves and protects the spirit of the statute of limitations while serving the limited purpose for which the nine months additional time is necessary.

Moreover, by requiring the Government to make a showing of "probable cause", the statute of limitations is not tolled merely on suspicion or "merely at the whim of the Government". (Gov. Br. 10). Congress must have intended in requiring that the complaint be filed before a Commissioner that the Commissioner act other than as a "rubber stamp" for the Government. But, what function can the Commissioner serve if the complaint contains only a statement of the essential elements constituting the offense? How could he tell from such a complaint that there is justification for tolling the statute of limitations? How could he tell that the statute was not being tolled "merely at the whim of the Government"? The answers to these questions are that unless there is a showing of "probable cause" required, the Commissioner merely acts as a "rubber stamp" and for all we know, then, the statute is being

tolled "merely at the whim" of the Government. It is respectfully submitted that Congress intended:

> ". . . that the inferences from the facts which lead to the complaint * * * be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required . . . [to toll the statute of limitations] . . . exists," **Giordenello v. United States**, 357 U. S. 480, 486, 78 S. Ct. 1245, 1250, 92 L. Ed. 436 (1958).[1]

In addition, Congress could have adopted other means to toll the statute of limitations. Instead, it chose to allow an extension of time only on filing of a complaint. Surely Congress was aware that "probable cause" was intimately associated with complaints. An arrest warrant or summons in lieu of arrest issued on complaint can only be issued on probable cause. **Rules 3 and 4, Federal Rules of Criminal Procedure.** When a person is arrested without a warrant, he must be taken speedily before a Commissioner, a complaint must be filed, and the prisoner must be released unless there is evidence justifying a finding of "probable cause." **Rule 5, Federal Rules of Criminal Procedure.** Thus, in all instances where a complaint is used, there must be a showing of "probable cause" and Congress must have been aware of this. Surely, then, Congress in choosing a complaint as the device for tolling the statute of limitations contemplated that a showing

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[1] The detailed activity in the Justice Department before it authorizes prosecution is entirely beside the point. Whatever the motives of the Justice Department, it does not serve a "neutral and detached function" in connection with a tax investigation. Besides, if the Commissioner is to rely only on the conclusion of the Justice Department, his role is reduced to that of "rubber stamp".

Also, the Justice Department's review procedure has its shortcomings. Taxpayers are not always given the opportunity to explain. In fact, petitioner Jaben in this case was never accorded a conference although he repeatedly requested one.

must be made to the Commissioner before the statute of limitations is tolled.[2]

Furthermore, the complaint herein has a second purpose besides tolling the statute of limitations for it served as a basis for issuing a summons. It has been held that the same probable cause required for the issuance of an arrest warrant is required for the issuance of a summons. **Greenberg v. United States**, 320 F. 2d 467, 471 (9th Cir. 1963). This is only reasonable because like an arrest warrant, the summons gives jurisdiction over the person, and only as a matter of convenience is a summons issued rather than a warrant. Further, an arrest warrant is issued if the defendant does not respond to the summons. Thus, the complaint herein served the function of bringing about the summons of the petitioner. It is absurd to contend that Congress intended that two different complaints be issued, one to arrest or summon the defendant and another to toll the statute, with only the latter requiring a showing of probable cause. This obviously is not the practice of the Department of Justice. Certainly Congress intended only one complaint, and this complaint had to allege probable cause.

In short, we believe Congress required the Government to show probable cause in order to preserve and protect

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[2] The Government cites the case of *Byrnes v. United States*, 327 F. 2d 825 (9th Cir. 1964), which holds that a Rule 5 complaint (as opposed to one under Rules 3 and 4) need not aver probable cause. Under Rule 5, the defendant is to be taken before a Commissioner "without unnecessary delay" and the Commissioner is required to hear evidence and determine whether "probable cause" exists from the evidence. Had petitioner been taken before a Commissioner "without unnecessary delay", had evidence been adduced, and had probable cause been shown, obviously petitioner could not be prejudiced. But there was no hearing held. And the Government never did show "probable cause" to the Commissioner. Under Rule 5, even if the complaint need not show probable cause it is nevertheless invalid if the Government cannot prove probable cause. Here the Government did not prove probable cause and for that reason the complaint would be invalid, if Rule 5 rather than Rules 3 and 4 applied.

the spirit of the statute of limitations, by preventing the statute of limitations from being tolled "merely at the whim" of the Government. Further, Congress in choosing a complaint as the device for tolling the statute of limitations knew that the term "complaint" had an established meaning, and that "probable cause" was a necessary element to validate any complaint. Congress had no reason to require less because the only interest to be served was to allow more time to convene a grand jury, to investigate defense explanations, or to confer with the Government, and this interest is not impaired by requiring the Government to show probable cause.

CONCLUSION.

For the reasons stated herein and in our initial brief, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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